Supreme Court, U.S.
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No. 90-1704

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER, 1990

JIMMIE D. OYLER, Petitioner

v.

THE STATE OF KANSAS

ON WRIT OF CERTIORARI TO THE

SUPREME COURT OF THE STATE OF KANSAS

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the Treaties with Great Britain, France, the Shawnee Nation, the Cherokee Nation, other Indian Nations, the Supremacy Clause of the United States Constitution, Art. VI, cl. 2, and Acts of Congress, preclude the State of Kansas, from exercising in rem jurisdiction over Petitioner's property, when Petitioner is an enrolled member of the Cherokee Nation, as a Loyal Shawnee, the Cherokee Nation, a sovereign nation and the successor nation to the Shawnee Nation as it existed in 1854, and when Petitioner is residing on Shawnee Reserve 206, restricted Indian land, within Indian Country.

II. Whether the failure of the State of Kansas to abide by the Treaties and the Supremacy Clause violates Petitioner's rights, privileges and immunities guaranteed him by 42 U.S.C. section 1983.

TABLE OF CONTENTS

Page

QUESTION PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii-vi

OPINIONS BELOW.....1

JURISDICTION.....1

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTORY PROVISION INVOLVED;.....1-4

STATEMENT OF THE CASE.....4-6

REASONS FOR GRANTING THE WRIT.....7-38

CONCLUSION.....39

APPENDIX.....40-66

TABLE OF AUTHORITIES
CASES

Page

Absentee Shawnee Tribe of Indians of Oklahoma v. The State Of Kansas, 862 F.2d 1415 (10th. Cir. 1988).....26

Antoine v. Washington, 420 U.S. 194, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975).....25

E.E.O.C. v. Cherokee Nation, 871 F.2d 937(10th Cir. 1989).....25,26

Iowa Tribe of Kansas and Nebraska v. State of Kansas, 787 F.2d 1434 (10th Cir. 1986).....35

Menominee Tribe v. United States, 391 U.S. 404, 413, 88 S.Ct. 1705, 20 L.Ed.2d 745 (1968).....25

Moe v. Salish & Kootenai Tribe, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976).....29

Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma, ____U.S.____ (1991).....29

Pennock v. Board of County Commissioners of Franklin County, 103 U.S. 367 (1881).....27

The Kansas Indians (Blue Jacket v. The Board of Commissioners of the County of Johnson), 72 U.S. (5 Wall) 737, (1867).....26,27

United States v. Michigan, 471 F. Supp. 192 (D. Mich. 1979), 653 F.2d 277 (1981), cert. denied 454 U.S. 1124 (1982).....28

Washington v. Confederated Tribes,
447 U.S. 134, 100 S.Ct. 2069, 65 L.
Ed.2d 10 (1980), reh den 448 U.S.
911 (1980).....29

CONSTITUTIONAL PROVISIONS

The United States Constitution, Article VI,
cl. 2.....2,7,24,61

STATJTES

An Act to provide for an Exchange of Lands
with the Indians residing in any of the
States or Territories, and for their removal
West of the River Mississippi, (Act of
Congress, May 28, 1830 4 Stat. 411,
Chapter 148).....3,16,18,20,27,33,55,61

An Act for the Issuance of Patents (11th
Section of the Act of Congress,
March 3, 1858, U.S. Statutes, Vol. 11,
p. 430, Sess. 11, Ch. 82, 1859,
35th Congress.....3,22,23,27,63

K.S.A. 79-3324(a).....4,5,36,37,63

18 U.S.C. section
3243.....6,34,35,36,37,45,47,65

25 U.S.C. section 71.....23

28 U.S.C. section 1254 (1).....4,66

42 U.S.C. section 1983.....4,37,38,66

TREATIES

Treaty with the Shawanoe, January 31, 1786 (7 Stat. 26).....2,7,49

Ordinance of the Confederated Congress, July 7, 1787.....8,49

Treaty with the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Putawatimes, Miamis, Eel-river, Wee's, Kickapoos, Piankeshaw's, and Kaskaskias, August 3, 1795 (7 Stat. 49).....2,9,50

Treaty with France, referenced as, "The Louisiana Purchase", April 30, 1803 (8 Stat. 200).....2,14,15,51

Treaty with the Wyandots, Delawares, Shawanoes, Senecas, and Miamis, July 22, 1814 (7 Stat. 118).....3,10,51

Treaty with Great Britain December 24, 1814 (8 Stat. 218).....2,10,52

Treaty with the Wyandotte, Seneca, Delawares, Shawanese, Potawatomie, Ottawas, and Chippewa, tribes of Indians, on September 29, 1817 (7 Stat. 160).....3,11,13,52

Treaty with the Wyandot, Seneca, Shawanese, Ottawas, Delaware, Potawatomees, and Chippeway Tribes of Indians, September 17, 1818 (7 Stat. 178).....3,13,53

Treaty with the Osage, June 2, 1825 (7 Stat. 240).....3,15,54

Treaty with the Shawnee, November 7, 1825 (7 Stat. 284).....3,4,15,26,27,54

Treaty with the Shawnee, August 8, 1831
(7 Stat. 355).....3,4,18,20,24,26,27,28,30,55

Treaty with the Cherokee, December 29, 1835
(7 Stat. 478).....3,30,57

Treaty with the Shawnee dated May 10, 1854
(10 Stat. 1053)...3,4,20,21,22,23,26,27,33,58

Treaty with the Cherokee, July 19, 1866, (14 Stat 799).....3,31,59

Agreement Between the Shawnee and Cherokee, concluded June 7, 1869, and approved by the President June 9, 1869.....3,4,32,60

Petitioner respectfully prays that a writ of certiorari issue to review the judgement and opinion of the Supreme Court of the State of Kansas entered in this matter on March 13, 1991.

OPINIONS BELOW

The March 13, 1991 opinion of the Kansas Supreme Court, whose judgment is herein sought to be reviewed, is unreported and is reprinted in the separate Appendix to this Petition, page 40. The opinion of the Kansas Court of Appeals is unreported and is reprinted in the separate Appendix to this Petition, page 41-48.

JURISDICTION

The judgement of the Supreme Court of the State of Kansas denying Petitioner's Petition for Review was entered March 13, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

This case involves the Supremacy Clause of the United States Constitution, Article VI, clause 2, which provides as follows: This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

This case also concerns the following Treaties. The Treaty with France, referenced as, "The Louisiana Purchase", April 30, 1803 (8 Stat. 200). The Treaty with Great Britain, December 24, 1814 (8 Stat. 218). The Treaty with the Shawanoe Nation, January 31, 1786 (7 Stat. 26). The Treaty with the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Putawatimes, Miamis, Eel-river, Wea's, Kickapoos, August 3, 1795, (7 Stat, 49). The Treaty with the Wyandots,

Delawares, Shawanoes, Senecas, and Miamis, July 22, 1814, (7 Stat. 118). The Treaty with the Wyandot, Seneca, Delaware, Shawanese, Potawatomees, Ottawas, and Chippeway Tribes, September 29, 1817 (7 Stat. 160). The Treaty with the Wyandot, Seneca, Delaware, Shawanese, Potawatomees, Ottawas, and Chippeway Tribes, September 17, 1818 (7 Stat. 178). Treaty with the Osage, June 2, 1825 (7 Stat. 240). The Treaty with the Shawnee, November 7, 1825 (7 Stat. 284). The Act of Congress, Approved, May 28, 1830; C. 148 (4 Stat. 411). The Treaty with the Shawnee August 8, 1831 (7 Stat. 355). The Treaty with the Shawnee, May 10, 1854 (10 Stat. 1053). The 11th Section of the Act of Congress, approved 3rd of March, 1859, (U.S. Statutes, Vol. 11, page 430). The Treaty with the Cherokee Nation, December 29, 1835 (7 Stat. 478). The Treaty with the Cherokee Nation, July 19, 1866 (14 Stat. 799). The Agreement Between the Shawnees and the Cherokee, concluded June 7, 1869, Approved by

the President June 9, 1869.

Statutes include: 42 U.S.C. section 1983, 18 U.S.C. section 3243, 28 U.S.C. section 1254(1), K.S.A. 79-3324(a).

STATEMENT OF THE CASE

This is an Indian treaty issue, whereby the State of Kansas has exercised in rem jurisdiction over Petitioner's property. Petitioner is an enrolled member of the Cherokee Nation, as a Loyal Shawnee. Petitioner's business is located and operated within Indian Country on land owned by Petitioner in restricted status and under the jurisdiction of the Cherokee Nation. This parcel of land is commonly known as Shawnee Reserve No. 206 and is located within the bounds of the Shawnee reservation established pursuant to the Treaties with the Shawnee, November 7, 1825 (7 Stat. 284) August 8, 1831 (7 Stat. 355) and May 10, 1854 (10 Stat. 1053).

On January 31, 1990, the State of Kansas filed a petition for civil forfeiture,

pursuant to K.S.A. 79-3324(a) seeking forfeiture of 8,888 cartons of cigarettes, four packages of cigarettes, $450.00 in United States currency and one check in the amount of $11.50. These items were seized from Petitioner pursuant to a search warrant executed on January 23, 1990.

On February 22, 1990, Petitioner filed a Motion to Dismiss based upon the fact that the State of Kansas and its Courts lacked civil jurisdiction to adjudicate this forfeiture proceeding. On March 9, 1990 an Amended Motion to Dismiss was filed. The motion was based on the treaties with the Shawnees, the Kansas Acts and general principles of federal Indian law. Both motions were denied by the District Court on March 13, 1990 without opinion.

On April 30, 1990, an order was signed by the District Court Judge directing the Kansas Department of Revenue to sell the cigarettes in a commercially reasonable manner.

On May 25, 1990, both parties filed motions for summary judgment and on June 8, 1990, Judge Sheldon issued a memorandum decision denying Petitioner's motion for summary judgment.

On July 2, 1990, Petitioner filed his Notice of Appeal with the Kansas Court of Appeals. On December 21, 1990, the appeal was denied. The Court of Appeals held that where the State of Kansas possesses criminal jurisdiction over the Petitioner (pursuant to 18 U.S.C. section 3243) for violation of the Kansas cigarette tax and sales tax laws, the State has in rem jurisdiction to proceed with the forfeiture of contraband seized from the Petitioner at the time of his arrest.

The decision of the Kansas Court of Appeals did not discuss or analyze the applicability of the treaties.

On January 18, 1991, a Petition for Review was filed with the Kansas Supreme Court and on March 13, 1991, the Petition for Review was denied.

REASONS FOR GRANTING THE WRIT

I.

Certiorari Should Be Granted Because the Kansas Supreme Court has failed to uphold the Indian Treaties as the Supreme Law of the Land, by refusing to review the decision of the Kansas Court of Appeals.

The promises, guarantees and immunities contained in the Treaties with the Shawnee, other Indian Nations and with other Countries, and the Supremacy Clause of the United States Constitution, Art. VI, cl. 2, preclude the State of Kansas from exercising in rem jurisdiction over the Petitioner's property.

During the early 1700's members of the Shawnee Nation were generally located in the area now known as the Ohio Valley.

On January 31, 1786, the United States and the Shawanoe Nation entered into a Treaty, (7 Stat. 26). Article II, contained the following:

... The Shawanoe Nation do acknowledge the United States to be the sole and absolute sovereigns of the territory ceded to them by a treaty of peace, made between them and the King of Great Britain, the 14 day of January, one thousand seven hundred and eighty-four...

Article V, contained the following:
...The United States do grant peace to the Shawanoe Nation, and do receive them into their friendship and protection...

Article VII, contained the following concerning citizens of the United States:
...If any citizen or citizens of the United States, shall presume to settle upon the land allotted to the Shawanoes by this treaty, he or they shall be put out of the protection of the United States...

On July 7, 1787, the Confederated Congress published an Ordinance for the government of the territory of the United States northwest of the river Ohio. Article III contained the following:
... The utmost good faith shall always be observed towards the Indians; their land and

property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws found in justice and humanity shall, from time to time, be made for preventing wrongs being done to them, and for preserving peace and friendship with them...

On August 3, 1795, the United States entered a Treaty with the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Putawatimes, Miamis, Eel-river, Wee's, Kickapoos, Piankeshaw's, and Kaskaskias, (7 Stat. 49). Article IV, contained the following concerning annual annuities:

...The Tribes to which those goods are to be annually delivered, and the proportions ... To the Shawanese, the amount of one thousand dollars...

Article V, contained the following about the United States protection:

... And the said tribes again acknowledge themselves to be under the protection of the said United States and no other power whatever...

On July 22, 1814, the United States entered into a Treaty with the Wyandots, Delawares, Shawanoes, Senecas, and Miamis, (7 Stat. 118). Article II, contained the following:

...The tribes or bands above mentioned engage to give their aid to the United States in prosecuting the war against Great Britain,... Article III, contained the following acknowledgment:

...who have preserved their fidelity to the United States throughout the war, again acknowledge themselves under the protection of said states, and no other power whatever:...

On December 24, 1814, the United States entered into a Treaty with Great Britain, (8 Stat. 218). The Ninth Article concerning the ratification of the Indian treaties and is

stated as follows:

...The United States of America engage to put an end, immediately after the ratification of the present treaty, to hostilities with all the tribes or nations of Indian with whom they may be at war at the time of such ratification; and forthwith whom they may be at war at time of such ratification; and forthwith to restore to such tribes or nations, respectively, all the possessions, rights, and privileges, which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities;... Provided always...

By 1817, the Shawnee Nation as well as other Tribes were located upon lands that by now had become part of the State of Ohio.

The United States entered into a Treaty with the Wyandotte, Seneca, Delawares, Shawanese, Potawatomie, Ottawas, and Chippewa, tribes of Indians, on September 29, 1817 (7 Stat. 160). Article 15 of the Treaty stated as follows:

...The tracks of land herein granted to the Chiefs, for the use of the Wyandotte, Shawnees, Seneca, and Delaware Indians, and the reserve for the Ottawa Indians, shall not be liable to taxes of any kind so long as such land continues the property of said Indians...

Attached to the Treaty was a "Schedule". The Schedule contained the following name, concerning the division of the track of Shawnee land, ten miles square, located at Wapaghkonetta - Thakoska or David M'Nair - believed by elder members of Petitioner's family to be the father of Newton McNeer, the original owner of Shawnee Reserve 206.

By 1817, the encroachment of non-Indians, led to the demand for the extinguishment of Indian title to Indian lands located within the State of Ohio. This demand resulted in a supplementary Treaty to the Treaty with the Wyandot, Seneca, Delaware, Shawanese, Potawatomees, Ottawas,

and Chippeway Tribes of Indians, dated September 29, 1817 (7 Stat. 160). The supplementary Treaty with the Wyandot, Seneca, Shawanese, Ottawas, Delaware, Potawatomees, and Chippeway Tribes of Indians, was signed on September 17, 1818 (7 Stat. 178).

Article 1, of the September 17, 1818 (7 Stat. 178), Treaty with the Wyandot, Seneca, Shawanese, Ottawas, Delaware, Potawatomees, and Chippeway Tribes of Indians, reads as follows:

... It is agreed, between the United States and the parties hereunto, that the several tracts of land, described in the treaty to which this is supplementary, and agreed thereby to be granted by the United States to the Chiefs of the respective tribes named therein, for the use of the individuals of the said tribes, and also the tract described in the twentieth article of the said treaty, shall not be thus granted, but shall be excepted from the cession made by the said tribes to the United States, reserved for the

use of said Indians, and held by them in the same manner as Indian reservations have been heretofore held...

In 1803 the United States entered into a Treaty with France, referenced as, "The Louisiana Purchase", April 30, 1803 (8 Stat. 200).

"The Louisiana Purchase" doubled the size of the United States. Article VI, of subject treaty contained the following: ...The United States promise to execute such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians, until, by mutual consent of the United States and the said tribes or nations, other suitable articles shall have been agreed upon...

Due to the continuing migration of non-Indians to the State of Ohio, the Shawnee Nation, by 1825, consisted of two Tribes. One tribe was located in the State of Ohio and the other tribe was located in the Spanish possession called the Louisiana

Purchase. The Shawnee Tribe that was located in the Louisiana Purchase was referred to as the "Missouri Shawnee." The Shawnee Tribe that was located in the State of Ohio was referred to as the "Ohio Shawnee." By 1825 it was the policy of the United States to remove the Indians located East of the Mississippi river to territories West of the Mississippi river.

In 1825, the United States entered into a treaty, Treaty with the Osage, June 2, 1825 (7 Stat. 240). This treaty provided the land, that had been part of "The Louisiana Purchase", that was to be given to the Shawnee pursuant to the 1825 Treaty with the Shawnee.

In 1825 the United States and the Missouri Shawnee entered into a treaty. Treaty with the Shawnee, November 7, 1825 (7 Stat. 284). The Missouri Shawnee were in the possession of and located on a track of land settled with the permission of the Spanish Government 4 January, 1793. Article 2 of

subject treaty stated:

... in consideration of the cessions aforesaid, The United States do, hereby, agree to give to the Shawnee Tribe of Indians, within the State of Missouri for themselves and for those of the same nation, now residing in Ohio, who may hereafter emigrate to the west of the Mississippi, a tract of land equal to fifty (50) miles square, situated west of the State of Missouri, and within the purchase lately made from the Osage, by treaty bearing date the second day of June, one thousand eight hundred and twenty five,...

On May 28, 1830 the Congress of the United States, passed an Act (4 Stat. at L. p. 411, chap. 148) whereby the President of the United States was directed to select a country west of the Mississippi, to remove and settle the Indians upon.

Section 3 of the Act provided as follows:

...That in making any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guaranty to them, and their heirs and successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same...

Section 7 of the Act provided as follows:

...That it shall and may be lawful for the President to have the same superintendence and care over any tribe or nation in the country to which they may remove, as contemplated by this act, that he is now authorized to have over them at present place of residence: Provided, That nothing in the act contained shall be construed as authorizing or directing the violation of any existing treaty between the United States and any Indian tribes...

In 1831 the United States government and the Ohio Shawnee entered into a treaty. Treaty with the Shawnee, August 8, 1831 (7 Stat. 355), under the authority of the Act of Congress, Sess. 1, Ch. 148 approved May 28, 1830. The beginning of the treaty reads as follows:

...Whereas the President of the United States under the authority of the Act of Congress, approved May 28, 1830, has appointed a special commissioner to confer with the different Indian tribes residing within the constitutional limits of the State of Ohio, and to offer for their acceptance the provisions of the before recited act: And Whereas the tribe or band of Shawnee Indians ... assent to the conditions of said act, ... in order to obtain a more permanent and advantageous home for themselves and their posterity ... which, when ratified by the President of the United States, by and with the advice and consent of the Senate thereof, shall be mutually binding upon the United

States and the said Shawnee Indians...

Pursuant to this Treaty the Shawnee Tribe promised to relinquish their lands located in the State of Ohio for:

... a tract of land to contain one hundred thousand acres, to be located under the direction of the President of the United States, within the track of land equal to fifty miles square, which was granted to the Shawnee Indians of the State of Missouri...

In Article X, the United States government promised and guaranteed that:

...The lands granted by this agreement and convention to the said band or tribe of Shawnee, shall not be sold or ceded by them, except to the United States. And the United States guarantee that the said lands shall never be within the bounds of any State or Territory, nor subject to the laws thereof: and further, that the President of the United States will cause said tribe to be protected at their intended residence, against all interruption or disturbance from any other

tribe or nation of Indians, or from any other person or persons whatever, and he shall have the same care and superintendence over them, in the country to which they are to remove, that he has heretofore had over them at their present place of residence... (emphasis added.)

The provisions of the 1831 Treaty with the Shawnee carried all previous Treaty Articles forward, as provided for by the Act of Congress, Approved, May 28, 1830; C. 148 (4 Stat. 411).

One of the signers of the 1831 Treaty was Peaghtucker, or McNear by his mark, believed to be Newton McNeer or an uncle of Newton McNeer by elder members of Petitioner's family.

In 1854 another Treaty with the Shawnee dated May 10, 1854 (10 Stat. 1053) was signed between the Shawnee Indians and the United States. In this Treaty, provision was made for the issuing of allotments. The 1854 Treaty with the Shawnee established a 200,000 acres reservation, but did not remove Shawnee

Tribal jurisdiction from the original 1.6 million acre reservation established by the 1825 and 1831 treaties. The jurisdiction over the total 1.6 million acres is assured by Article 2 of subject treaty which allowed the following:

...All the land selected, as herein provided, west of said parallel line, and that set apart to the respective societies for schools, and to the churches before named, shall be considered as part of the two hundred thousand acres reserved by the Shawnee...

Article 2 of the May 10, 1854 Treaty with the Shawnee allowed land located within the Reservation to be allotted to individual members of the Tribe or held in common by Tribal members as follows:

... if a single person, two hundred acres, and if the head of a family, a quantity equal to two hundred acres for each member of his or her family ... In the settlement known as Black Bob's settlement, in which he has an

improvement, whereon he resides; and in that known as Long Tail's settlement, in which he has improvement whereon he resides, there are a number of Shawnee who desire to hold their land in common;...

Article 9 of the 1854 Treaty with the Shawnee, also provided:

... Congress may hereafter provide for the issuing, to such of the Shawnee as may make separate selections, patents for the same, with such guards and restrictions as may seem advisable for their protection therein.

The United States Congress provided for the issuing of patents, by the 11th Section of the Act of Congress, approved 3rd of March, 1859, (U.S. Statutes, Vol. 11, page 430).

Article 14, acknowledged the Shawnee dependence on the United States Government as follows:

...The Shawnee acknowledge their dependence on the Government of the United States, and invoke its protection and care. They will abstain from the commission of depredations,

and comply, as far as they are able, with laws in such cases made and provided, as they will expect to be protected, and have their rights vindicated...

Shawnee Reserve 206, Petitioner's land, is a restricted patent allotment issued to Shawnee Indians, Newton McNeer and Nancy McNeer under the provisions of the 2nd and 9th Articles of the Treaty with the Shawnee dated May 10, 1854 and pursuant to the provision of the 11th Section of the Act of Congress, approved 3rd March, 1859; (U.S. Statutes, Vol. 11. page 430).

25 U.S.C. section 71 provides:

"No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; <u>but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired</u>... (emphasis added.)

Thus, pursuant to federal law, the obligations of the aforementioned treaties shall not be invalidated or impaired.

The Supremacy Clause of the United States Constitution, Article VI, clause 2, provides as follows:

...This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding...

The meaning of Article X, in the 1831 Treaty with the Shawnee is clear and unambiguous. It is specifically stated that the Shawnees shall never be within the bounds of any state or territory nor subject to its laws, and therefore the assumption of in rem jurisdiction allowed by the Kansas Court of Appeals violates the treaties and the United

States Constitution.

Over the years, this Court and lower Federal Courts have developed canons of construction to determine the existence or non-existence of treaty rights, the interpretation of treaty rights and whether or not a treaty has been abrogated by Congress.

First, "rights secured by Treaty will not be deemed to have been abrogated or modified absent a clear expression of congressional purpose for the intention to abrogate or modify a Treaty is not to be lightly imputed to Congress." Menominee Tribe v. United States, 391 U.S. 404, 413, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968); E.E.O.C. v. Cherokee Nation, 871 F.2d 939 (10th Cir. 1989).

The second canon of construction holds that treaties are to be read in the sense in which the Indians understood them, and the language used in treaties should never be construed to the Indians' prejudice. Antoine

v. Washington, 420 U.S. 194, 199, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975); Absentee Shawnee Tribe of Indians v. State of Kansas, 862 F.2d 1415, 1418 (10th Cir. 1988).

The language of Article X of the 1831 Treaty and the other treaties is clear and to construe the plain language of the Treaties against Petitioner, as the Kansas Court of Appeals has done, violates the canon of construction as set forth above.

The Treaties have never been abrogated by Congress and are therefore the Supreme Law of the land. The State of Kansas has no in rem jurisdiction over the Petitioner's property.

The only existing case interpreting the 1825, 1831, and 1854 treaties with the Shawnee and associated Acts of the United States Congress and pertaining to Petitioner's land is The Kansas Indians (Blue Jacket v. The Board of Commissioners of the County of Johnson), 72 U.S. (5 Wall) 737, (1867). In that case the issue facing this Court was whether the lands belonging to the

Shawnee with separate estates were taxable. In deciding the issue, this Court was required to thoroughly analyze the numerous Indian treaties including the 1825, 1831 and 1854 Treaties with the Shawnee, and Acts of the United States Congress. The Court held that Johnson County could not tax these lands. The Court based its decision on the 1825, 1831 and 1854 Treaties, the Act of Congress, May 28, 1830, the Kansas Act for Admission and the Kansas Organic Act. By disclaiming all jurisdiction over the Indians, their lands and property, Kansas had forfeited any right it might otherwise have had to tax Shawnee lands. Indeed, in dicta, this Court went so far as to state that the Shawnee lands were withdrawn from the operation of state laws. The Kansas Indians, at pages 756 and 757. (See also, Pennock v. Board of County Commissioners of Franklin County, 103 U.S. 367 (1881)).

The power to tax is a matter that is generally within the exclusive power of a

state. However, when this power is preempted by a treaty, as in this case, a state may not enact or enforce any statute which conflicts with a treaty. United States v. Michigan, 471 F. Supp. 192, 265-266 (D. Mich. 1979), 653 F.2d 277 (1980), cert. denied 454 U.S. 1124 (1981). The actions of the State of Kansas conflict with Article X of the 1831 Treaty and with the articles of the other Treaties with the Shawnee and the Act of Congress. Therefore the Kansas civil forfeiture laws are preempted by the Treaties and do not apply to Petitioner.

Article X of the 1831 Treaty and the provisions of the other Treaties cited infra, preempt any exercise of in rem jurisdiction by the State of Kansas over Petitioner.

The Court of Appeals contended that certain decisions of this court, cited below, vest in rem jurisdiction in the District Court of Johnson County and allow the District Court to apply state forfeiture laws to Petitioner. This, despite Article X of

the 1831 Treaty.

In Moe v. Salish & Kootenai Tribe, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976), this Court was required to determine the validity of a state cigarette sales tax as applied to an Indian smokeshop. The Court held that if the smokeshop sold cigarettes to non-Indians, the state could require the Indian proprietor to collect the state tax.

Similarly in Washington v. Confederated Tribes, 447 U.S. 134, 100 S.Ct. 2069, 65 L.Ed.2d 10 (1980), reh. denied 448 U.S. 911, (1980), another state cigarette sales tax case, this Court held the state may validly require a tribal smokeshop to affix tax stamps purchased from the state to individual packages of cigarettes prior to their sale to non-members of the Tribe.

In a recent case, decided by this Court, Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, ___ U.S.____, (1991), the holdings of Moe and Washington were affirmed.

These cases cited by the Court of Appeals and the recent case decided by this Court are easily distinguishable from Petitioner's case. The treaties of the Tribes involved in these cases do not contain any provision such as that found in Article X of the 1831 Treaty with the Shawnee. Namely, that those Tribes would never be within the bounds of any state or territory, or subject to their laws.

These cases are inopposite to this case. The State of Kansas has no in rem jurisdiction over Petitioner.

In 1835, the United States and the Cherokee Nation entered into a treaty at New Echota, Treaty with the Cherokee, December 29, 1835, (7 Stat. 478). Article 5, of this Treaty reads as follows:

...The United States hereby covenant and agree that the lands ceded to the Cherokee Nation in the forgoing article shall, in no future time without their consent, be included within the territorial limits or

jurisdiction of any State or Territory. But they shall secure to the Cherokee Nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves with them: provided always that they shall not be inconsistent with the constitution of the United States and such acts of congress as have been passed or may be passed regulating trade and intercourse with the Indians;... (emphasis added.)

In 1866, the United States and the Cherokee Nation entered into a treaty, Treaty with the Cherokee, July 19, 1866, (14 Stat. 799). Provisions were made whereby the Shawnee Indians, members of the Shawnee Nation as the Shawnee Nation existed in 1854, could join with the Cherokee Nation:

...Should any such tribe or band of Indians settling in said country abandon their tribal organization, there being first paid into the

Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the whole number of Cherokee then residing in the Cherokee country, they shall be incorporated into and ever after remain a part of the Cherokee nation, on equal terms in every respect with native citizens...

An Agreement Between the Shawnee and Cherokee, concluded June 7, 1869, and approved by the President June 9, 1869, states the following:

...And that the sum of fifty thousand dollars shall be paid to the said Cherokees, as soon as the same shall be received by the United States, for the Said Shawnees, from the sale of the lands in the State of Kansas known as the Absentee Shawnees Lands, in accordance with the resolution of Congress, approved April 7th, 1869, entitled " A resolution for the relief of settlers upon the Absentee Shawnee Lands in Kansas," and also to such as

properly belong to said tribe who may be as present elsewhere, and including those known as the Absentee Shawnee now residing in Indian Territory---into the country of the said Cherokees, upon unoccupied lands east of 96 degrees; and that the said Shawnee shall be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect, and with all the privileges and immunities of native citizens of said Cherokee Nation;...

On June 9, 1869, the Cherokee Nation thus became the successor Nation for the Loyal Shawnees of the Shawnee Nation as the Shawnee Nation existed in 1854.

The Act of May 28, 1830, 4 Stat. at L. p 411, chap. 148 allowed and provided for the Cherokee Nation, to become the successor Nation with jurisdiction over the Loyal Shawnee, members of the Cherokee Nation, who are lineal descendants of the Shawnee Nation as it existed in 1854 and owned restricted land within the limits of the Shawnee reservation as established by the 1854 Treaty

with the Shawnee.

The Court of Appeals contended that 18 U.S.C.A. section 3243 is a grant of congressional authority from the United States Government to the State of Kansas and that this law allows the District Court of Johnson County to exercise in rem jurisdiction over Petitioner's property.

18 U.S.C.A. section 3243 provides:

...Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State.

This section shall not deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations...

This statute applies to misdemeanor offenses committed by members of the four tribes of northeast Kansas, that is, the Kickapoo, Potawatomi, the Sac & Fox and the Iowa. Iowa Tribe of Kansas and Nebraska v. State of Kansas, 787 F.2d 1434 (10th Cir. 1986). This law does not apply to Petitioner.

This is clear from the legislative history of the statute which consist of three documents: a letter from Congressman W. P. Lambertson, a representative from the 2nd Congressional District, which encompassed the four reservation of northeast Kansas, a letter from the Acting Secretary of the Interior, E. K. Burlew and an attached memorandum. A careful reading of these documents shows that 18 U.S.C. 3243 was meant to apply only to those four reservations. For example, Congressman Lambertson states in his letter:

...All parties are agreed on this bill - the Indians, the Superintendent, the Indian Agencies on the Kansas reservation, which are

all in my district, and the people that are on and surround the reservation...

Shawnee Reserve 206 is not and was not within Congressman Lambertson's 2nd district, but is surrounded by the 3rd congressional district. The memorandum attached to Secretary Burlew's letter contains no fewer than five references to "the four tribes" or "four reservations." Moreover, both the letter from Secretary Burlew and the attached memorandum clearly state that the passage of this legislation had been requested by the four tribes of northeast Kansas, e.g. the Sac & Fox, Kickapoo, Potawatomi and the Iowa. There is no resolution from the Cherokee Nation (Cherokee Shawnee, Loyal Shawnee), requesting the State of Kansas to assume jurisdiction over Shawnee Reserve 206. This law, by its own terms, is a criminal jurisdictional statute. The action filed by the State in the District Court against Petitioner was a <u>civil</u> forfeiture action pursuant to K.S.A. 79-3324(a). A criminal

jurisdictional statute, such as 18 U.S.C. section 3243, cannot provide the basis for in rem jurisdiction. The legislative history of 18 U.S.C.A. section 3243 confirms this.

II

Certiorari should be granted because the actions of the State of Kansas, in failing to abide by and uphold the aforementioned treaties, violates Petitioner's rights, privileges and immunities guaranteed him by 42 U.S.C. 1983.

42 U.S.C. section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state...subjects any citizen of the United States...to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws shall be liable to the party injured...

Treaties, such as those previously cited by Petitioner contain rights, privileges and immunities secured by the United States Constitution and Federal Laws. In particular, the right to be free from state

law when conducting a lawful business within Indian Country. Indeed, pursuant to the Supremacy Clause, the State of Kansas was obligated to uphold Petitioner's treaty rights despite state laws seemingly to the contrary.

The failure of the State of Kansas to abide by and uphold the aforementioned treaties and the actions of the State in confiscating Petitioner's property pursuant to state laws violates Petitioner's rights under 42 U.S.C. section 1983.

CONCLUSION

Wherefore, Petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

Pamela S. Thompson
4400 Elkhorn Blvd., #117
Sacramento, CA 95842
(916) 334-9155
Attorney for Petitioner

APPENDIX

COURT OF APPEALS ORDER

DISTRICT CASE NO. 90C1293

IN THE COURT OF APPEALS

OF THE STATE OF KANSAS

PAMELA S. THOMPSON
4400 ELKHORN BLVD. #117
SACRAMENTO CA 95842

STATE OF KANSAS, APPELLEE,

V NO. 90-65417-A

JIM D. OYLER, SR., APPELLANT

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN IN THE ABOVE ENTILED CASE:

PETION FOR REVIEW - OYLER

CONSIDERED BY THE COURT AND DENIED.

DATE 03/13/91

YOURS VERY TRULY
LEWIS C. CARTER
CLERK, SUPREME COURT

No. 65,417

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Appellee

v.

JIMMIE D. OYLER, SR.,
Appellant.

SYLLABUS BY THE COURT

1.

The State's jurisdiction in a forfeiture proceeding is not derived from civil jurisdiction over the person of the defendant but is based on in rem proceedings against the goods seized as contraband.

2.

Where the State of Kansas possesses criminal jurisdiction over a defendant for violation of the Kansas cigarette tax and sales tax laws, it has in rem jurisdiction to proceed with the forfeiture of contraband seized from the defendant at the time of his arrest.

Appeal from Johnson District Court; JANETTE SHELDON, judge. Opinion filed December 21, 1990. Affirmed.

Pamela S. Thompson, of Horton, for the appellant.

Melinda S. Whitman, assistant district attorney, Paul J. Morrison, district attorney, and Robert T. Stephan, attorney general, for the appellee.

Before LARSON, P.J., DAVIS, J., AND RICHARD W. WAHL, District Judge Retired, assigned.

DAVIS, J.,: The defendant, Jimmie D. Oyler, Sr., appeals the forfeiture of cigarettes and money seized by the State of Kansas at the time of his arrest. He contends that the State of Kansas lacks civil jurisdiction to proceed with a forfeiture action because he is a Cherokee Indian and because his smokeshop is located on Indian land.

Jimmie D. Oyler, Sr., owns and operates Shawnee Jim's Indian Country Smokeshop

(Smokeshop) located in rural Johnson County, Kansas. Oyler is an enrolled member of the Cherokee Nation. The Smokeshop is on Shawnee Reserve 206 which Oyler claims is Indian land.

The Kansas Department of Revenue determined that Oyler was not eligible to possess or sell cigarettes without Kansas tax stamps and denied his request for permission to allow a wholesaler to sell untaxed cigarettes to him. In August 1988, the Kansas Director of Taxation notified Oyler that he was violating Kansas law for selling non-taxed cigarettes from his Smokeshop and ordered Oyler to cease and desist.

On December 2, 1989, Kansas Bureau of Investigation Special Agents Nathan Yonally and Richard Marchewka, working undercover, entered the defendant's Smokeshop and purchased three cartons of cigarettes. None of the cigarette packages had Kansas tax stamps on them and Agent Yonally did not pay sales tax. The defendant did not ask the

agent if he was an Indian.

The defendant was tried and convicted on three counts of possession of more than 200 cigarettes without the required tax indica (K.S.A. 79-3321) and three counts of selling cigarettes at retail that did not bear the Kansas tax indica (K.S.A. 79-3321). We affirmed the defendant's conviction in *State v. Oyler,* 15 Kan. App. 2d ___. ___ P.2d ___ (No. 65,061, filed December 21, 1990).

At the time of the defendant's arrest, 8,888 cartons of cigarettes, money from cigarette sales, and records concerning sale of cigarettes were seized. An order to show cause why the seized property should not be forfeited was filed. The defendant's motion to dismiss for lack of subject matter jurisdiction was denied without opinion by the trial court. The cigarettes seized were ordered forfeited as contraband and sold, and the proceeds from the sale were placed with the Johnson County District Court. Defendant appeals from the trial court's grant of the

State's motion for summary judgment on the issue of forfeiture.

The facts are not in dispute. The sole issue raised by the defendant involves his contention that the State of Kansas lacks jurisdiction to proceed with forfeiture because he is a Cherokee Indian and his Smokeshop is on Indian land. In *State v. Oyler*, 15 Kan. App. 2d. ___, we held that the State of Kansas possessed criminal jurisdiction over Jimmie D. Oyler, Sr., under the provisions of 18 U.S.C. 3243 (1988). Based on its exercise of criminal jurisdiction over the defendant, the State at the time of defendant's arrest seized the property in question as contraband. K.S.A. 79-3323 defines contraband as it relates to this case as "[a]ll packages of cigarettes, in quantities of twenty (20) packages or more, not bearing indica of tax payment as required in this act."

Forfeiture actions are proceedings in rem:

"Forfeiture statutes are premised on the notion that the thing to be forfeited has itself offended society, either because it is contraband or has been used to violate laws deemed of special social importance. [Citation omitted.] . . . Although enforced through proceedings in rem, forfeitures are penal in nature. [Citation omitted.]" *State v. One 1987 Chevrolet corvette,* 8 Kan. App. 2d 747, 749-750, 667 P.2d 893 (1983).

The State's jurisdiction in this case is not derived from civil jurisdiction over the person of the defendant but is based on in rem proceedings against the goods seized as contraband.

Moreover, the forfeiture in this case is penal in nature. The State of Kansas possessed criminal jurisdiction over the defendant for violation of the Kansas

cigarette tax and sales tax laws. *State v. Oyler*, 15 Kan. 2d ___. It is from the criminal action and seizure of contraband that the State of Kansas has jurisdiction to proceed in rem with the forfeiture of the contraband. It also follows that the State of Kansas possesses jurisdiction over the defendant due to the penal nature of the forfeiture under the provisions of 18 U.S.C. 3243.

Having concluded that criminal jurisdiction was conferred upon the State of Kansas by the provisions of 18 U.S.C. 3243, it becomes unnecessary to determine whether the State of Kansas has civil jurisdiction over the defendant. We acknowledge that neither Kansas nor the United States Congress has acted to assume civil jurisdiction over Indians in the State of Kansas. However, contrary to the defendant's contention, such legislation is not necessary in this case because the State of Kansas properly assumed criminal jurisdiction over the defendant

which was sufficient to support the in rem forfeiture action.

Affirmed.

TREATIES

Treaty with the Shawanoe Nation, January 31, 1786 (7 Stat. 26), Article II:

... The Shawanoe Nation do acknowledge the United States to be the sole and absolute sovereigns of the territory ceded to them by a treaty of peace, made between them and the King of Great Britain, the 14 day of January, one thousand seven hundred and eighty-four...

Article V:

...The United States do grant peace to the Shawanoe Nation, and do receive them into their friendship and protection...

Article VII:

...If any citizen or citizens of the United States, shall presume to settle upon the land allotted to the Shawanoes by this treaty, he or they shall be put out of the protection of the United States...

Ordinance of the Confederated Congress, July 7, 1787, Article III:

... The utmost good faith shall always be observed towards the Indians; their land

and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws found in justice and humanity shall, from time to time, be made for preventing wrongs being done to them, and for preserving peace and friendship with them...

Treaty with the Wyandots, Delawares, Shawanoes, Ottawas, Chipewas, Putawatimes, Miamis, Eel-river, Wee's, Kickapoos, Piankeshaw's, and Kaskaskias, August 3, 1795, (7 Stat. 49), Article IV:

...The Tribes to which those goods are to be annually delivered, and the proportions ... To the Shawanese, the amount of one thousand dollars...

Article V:

... And the said tribes again acknowledge themselves to be under the protection of the said United States and no

other power whatever...

Treaty with France, April 30, 1803 (8 Stat. 200). Article VI:

...The United States promise to execute such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians, until, by mutual consent of the United States and the said tribes or nations, other suitable articles shall have been agreed upon...

Treaty with the Wyandots, Delawares, Shawanoes, Senecas, and Miamis, July 22, 1814, (7 Stat. 118), Article II:

...The tribes or bands above mentioned engage to give their aid to the United States in prosecuting the war against Great Britain,...

Article III:

...who have preserved their fidelity to the United States throughout the war, again acknowledge themselves under the protection of said states, and no other power

whatever:...

Treaty with Great Britain, December 24, 1814 (8 Stat. 218), Ninth Article:

...The United States of America engage to put an end, immediately after the ratification of the present treaty, to hostilities with all the tribes or nations of Indians with whom they may be at war at the time of such ratification; and forthwith whom they may be at war at time of such ratification; and forthwith to restore to such tribes or nations, respectively, all the possessions, rights, and privileges, which they may have enjoyed or been entitled to in one thousand eight hundred and eleven, previous to such hostilities;... Provided always... Provided always...

Treaty with the Wyandotte, Seneca, Delawares, Shawanese, Potawatomie, Ottawas, and Chippewa, tribes of Indians, on September 29, 1817 (7 Stat. 160), Article 15: ...The tracks of land herein granted to the Chiefs, for the use of the Wyandotte,

Shawnees, Seneca, and Delaware Indians, and the reserve for the Ottawa Indians, shall not be liable to taxes of any kind so long as such land continues the property of said Indians...

Treaty with the Wyandot, Seneca, Shawanese, Ottawas, Delaware, Potawatomees, and Chippeway Tribes of Indians, September 17, 1818 (7 Stat. 178).

Article 1:... It is agreed, between the United States and the parties hereunto, that the several tracts of land, described in the treaty to which this is supplementary, and agreed thereby to be granted by the United States to the Chiefs of the respective tribes named therein, for the use of the individuals of the said tribes, and also the tract described in the twentieth article of the said treaty, shall not be thus granted, but shall be excepted from the cession made by the said tribes to the United States, reserved for the use of said Indians, and held by them in the same manner as Indian

reservations have been heretofore held...

Treaty with the Osage, June 2, 1825 (7 Stat. 240). Article 1:

...The Great and Little Osage Tribes or Nations do, hereby, cede and relinquish to the United States, all their rights, title, interest, and claim, to lands...lying west of the said State of Missouri...South of the Kansas River, and East of a line to be drawn from the head source of the Kansas, Southwardly through the Rock Saline, with such reservations,...

Treaty with the Shawnee, November 7, 1825 (7 Stat. 284), Preamble:

... The Missouri Shawnee were in the possession of and located on a track of land settled with the permission of the Spanish Government 4 January, 1793...

Article 2:

... in consideration of the cessions aforesaid, The United States do, hereby, agree to give to the Shawnee Tribe of Indians, within the State of Missouri for

themselves and for those of the same nation, now residing in Ohio, who may hereafter emigrate to the west of the Mississippi, a tract of land equal to fifty (50) miles square, situated west of the State of Missouri, and within the purchase lately made from the Osage, by treaty bearing date the second day of June, one thousand eight hundred and twenty five,...

Treaty with the Ohio Shawnee, August 8, 1831 (7 Stat. 355), Preamble:

...Whereas the President of the United States under the authority of the Act of Congress, approved May 28, 1830, has appointed a special commissioner to confer with the different Indian tribes residing within the constitutional limits of the State of Ohio, and to offer for their acceptance the provisions of the before recited act: And Whereas the tribe or band of Shawnee Indians ... assent to the conditions of said act, ... in order to obtain a more permanent and advantageous home for themselves and

their posterity ... which, when ratified by the President of the United States, by and with the advice and consent of the Senate thereof, shall be mutually binding upon the United States and the said Shawnee Indians...

Article II:... a tract of land to contain one hundred thousand acres, to be located under the direction of the President of the United States, within the track of land equal to fifty miles square, which was granted to the Shawnee Indians of the State of Missouri...

Article X:

...The lands granted by this agreement and convention to the said band or tribe of Shawnee, shall not be sold or ceded by them, except to the United States. And the United States guarantee that the said lands shall never be within the bounds of any State of Territory, nor subject to the laws thereof; and further, that the President of the United States will cause said tribe to be protected at their intended residence, against all

interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatever, and he shall have the same care and superintendence over them, in the country to which they are to remove, that he has heretofore had over them at their present place of residence...

Treaty at New Echota, Treaty with the Cherokee, December 29, 1835 (7 Stat. 478), Article 5:

...The United States hereby covenant and agree that the lands ceded to the Cherokee Nation in the forgoing article shall, in no future time without their consent, be included within the territorial limits or jurisdiction of any State or Territory. But they shall secure to the Cherokee Nation the right by their national councils to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country belonging to their people or such persons as have connected themselves

with them: provided always that they shall not be inconsistent with the constitution of the United States and such acts of congress as have been passed or may be passed regulating trade and intercourse with the Indians;...

Treaty with the Shawnee May 10, 1854 (10 Stat. 1053), Article 2:

...All the land selected, as herein provided, west of said parallel line, and that set apart to the respective societies for schools, and to the churches before named, shall be considered as part of the two hundred thousand acres reserved by the Shawnee...

... if a single person, two hundred acres, and if the head of a family, a quantity equal to two hundred acres for each member of his or her family ... In the settlement known as Black Bob's settlement, in which he has an improvement, whereon he resides; and in that known as Long Tail's settlement, in which he has improvement

whereon he resides, there are a number of Shawnee who desire to hold their land in common;...

Article 9:

... Congress may hereafter provide for the issuing, to such of the Shawnee as may make separate selections, patents for the same, with such guards and restrictions as may seem advisable for their protection therein.

Treaty with the Cherokee, July 19, 1866 (14 Stat. 799), Article 15:

...Should any such tribe or band of Indians settling in said country abandon their tribal organization, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the whole number of Cherokee then residing in the Cherokee country, they shall be incorporated into and ever after remain a part of the Cherokee nation, on equal terms in every respect with

native citizens...

Agreement Between the Shawnee and Cherokee, concluded June 7, 1869, and approved by the President June 9, 1869:

...And that the sum of fifty thousand dollars shall be paid to the said Cherokees, as soon as the same shall be received by the United States, for the Said Shawnees, from the sale of the lands in the State of Kansas known as the Absentee Shawnees Lands, in accordance with the resolution of Congress, approved April 7th, 1869, entitled " A resolution for the relief of settlers upon the Absentee Shawnee Lands in Kansas," and also to such as properly belong to said tribe who may be as present elsewhere, and including those known as the Absentee Shawnee now residing in Indian Territory---into the country of the said Cherokees, upon unoccupied lands east of 96 degrees; and that the said Shawnee shall be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect, and with all the privileges

and immunities of native citizens of said Cherokee Nation;...

CONSTITUTIONAL PROVISIONS

The United States Constitution, Article VI, clause 2, which provides as follows: ...This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding...

STATUTES

An Act to provide for an Exchange of Lands with the Indians residing in any of the States or Territories, and for their removal West of the River Mississippi, (Act of Congress, May 28, 1830 4 Stat. 411, Chapter 148).

Section 3:

...That in making any such exchange or exchanges, it shall and may be lawful for the President solemnly to assure the tribe or nation with which the exchange is made, that the United States will forever secure and guaranty to them, and their heirs and successors, the country so exchanged with them; and if they prefer it, that the United States will cause a patent or grant to be made and executed to them for the same...

Section 7:

...That it shall and may be lawful for the President to have the same superintendence and care over any tribe or nation in the country to which they may remove, as contemplated by this act, that he is now authorized to have over them at present place of residence: Provided, That nothing in the act contained shall be construed as authorizing or directing the violation of any existing treaty between the United States and any Indian tribes...

An Act for the Issuance of Patents (11th Section of the Act of Congress, March 3, 1859, U.S. Statutes, Vol. 11, p. 430, Sess. 11, Ch. 82, 1859, 35th Congress.

...For surveying the necessary base, meridian, standard parallels, township, and section lines in Kansas and Nebraska, also outlines of Indian reservations, including liabilities incurred in the years eighteen hundred and fifty-five, eighteen hundred and fifty-six, eighteen hundred and fifty-seven, and eighteen hundred and fifty-eight, forty thousand dollars...

K.S.A. 79-3324(a).

...Contraband goods; seized and sale; disposition of proceeds. (a) All of the cigarettes and property seized shall first be listed and appraised by the officer making the seizure, and turned over to the county sheriff of the county in which the seizure is made and a receipt therefor taken. The person making the seizure shall immediately make and file a written report thereof

showing the name of the person making the seizure, the place where, and the person from whom the property was seized, and inventory and appraisement thereof, at the usual and ordinary wholesale price of the articles received to the director of taxation. The county or district attorney of county in which the seizures are made may, at the request of the director, file in the district court forfeiture proceedings in the name of the state of Kansas, as plaintiff, and in the name of the owner or person in possession, as defendant, if known, and if unknown in the name of the property seized. The clerk of the court shall issue summons to the owner or person in whose possession such property was found, directing him or her to answer within ten (10) days. If the property is declared forfeited and ordered sold, notice of the sale shall be posted in five (5) public places in the county not less than ten (10) days before the date of sale, except that cigarettes shall be withheld from public sale

and shall be sold by the director of taxation to the manufacture of such cigarettes or to a licensed distributor and the purchase price shall be paid to the director of taxation and treated as cigarette tax collected. The proceeds of any public sale shall be deposited with the clerk of the court, who shall after deducting costs, including the cost of the sale, pay the balance to the treasure of the county wherein said sale is constructed. Said treasure shall credit the entire amount thereof to the county general fund...

18 U.S.C. section 3243.

...Jurisdiction is conferred on the State of Kansas over offenses committed by or against Indians on Indian reservations, including trust or restricted allotments, within the State of Kansas, to the same extent as its courts have jurisdiction over offenses committed elsewhere within the State in accordance with the laws of the State. This section shall not deprive the courts of

the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations...

28 U.S.C. section 1254 (1):

...(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;...

42 U.S.C. section 1983:

...Every person who, under color of any statue, ordnance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

Supreme Court, U.S.
FILED
JUN 26 1991
OFFICE OF THE CLERK

(2)

No. 90-1704

In The

Supreme Court of the United States

October Term, 1990

JIMMIE D. OYLER, SR.,

Petitioner,

vs.

THE STATE OF KANSAS,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Kansas

BRIEF IN OPPOSITION

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the State of Kansas has jurisdiction to forfeit untaxed cigarettes confiscated pursuant to a search warrant from Jimmie D. Oyler, Sr.'s "Smokeshop" which is located on private property and not operated by an Indian tribe even though he is allegedly a tribal member of the Cherokee nation and his "smokeship" is allegedly located on allotted land and when he is not exempt from payment of state sales tax in violation of Kansas law, when he has been criminally convicted of illegal possession and sale of untaxed cigarettes in violation of Kansas law.

PARTIES

The parties to the proceeding in the court whose judgment is sought to be reviewed include:

Jimmie D. Oyler, Sr., respondent below and petitioner here.

The State of Kansas, plaintiff below and respondent here.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 5

ARGUMENT FOR DENYING THE PETITION 7

I. The petitioner's request for review should be denied 7

A. The petitioner has erroneously cited 28 U.S.C. 1254(1) as the basis for this Court's jurisdiction 7

B. The burden is on the petitioner to show affirmatively that the Supreme Court has jurisdiction, a burden which the petitioner has failed to sustain in this case 7

C. Petitioner has not complied with the rules of this Court 7

1. The petitioner has not complied with Rule 10.1(b) or (c) because the highest court in Kansas has not addressed the jurisdiction issue on its merits 8

2. Petitioner's request for review should be denied for lack of clarity and specificity in violation of Rules 14.1 and 14.5 8

D. The decision of the Kansas State District Court finding jurisdiction was based on the decisions of this Court 9

TABLE OF CONTENTS – Continued

Page

E. Petitioner's earlier request for review by Certiorari was denied by the Court..... 11

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cases

California State Board of Equalization v. Chemchuevi Indian Tribe, 474 U.S. 9 (1985), *reh. denied*, 474 U.S. 1077 (1986), *cert. denied*, 481 U.S. 1051 (1987) 6, 10

Dept. of Dental Hygiene of California v. Kirchner, 380 U.S. 194 (1965), *on remand*, 43 Cal. Rptr. 329, 400 P.2d 321 (1965) 7

The Kansas Indians (Blue Jacket v. The Board of Commissioners of the County of Johnson), 72 U.S. (5 Wall) 737 (1867) 10

Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976) 5, 6, 10

Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 59 U.S.L.W. 4137 (U.S. Feb. 26, 1991) 6, 10

Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980) 4, 6, 10

Statute

U.S.C. 1254(1) 7

Rules

Rule 10.1 8

Rule 10.1(b) 8

Rule 10.1(c) 8

Rule 14.1 8

Rule 14.1(e), (g), (h), (j) 8

Rule 14.5 ..... 8, 9

No. 90-1704

In The

Supreme Court of the United States

October Term, 1990

JIMMIE D. OYLER, SR.,

Petitioner,

vs.

THE STATE OF KANSAS,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of The State Of Kansas

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On January 23, 1990, the State of Kansas filed a criminal complaint charging Jimmie D. Oyler, Sr. with violations of Kansas law for the possession and sale of untaxed cigarettes pursuant to Kansas Statutes Annotated 79-3321(a) and (n) and 79-3322. Under those subsections of the Kansas Statutes, it shall be unlawful for any person:

> 79-3321(a) To possess, except as otherwise specifically provided by this act, more than 200 cigarettes without the required tax indicia being affixed as herein provided.
>
> * * *

> (n) To sell cigarettes to a retailer or at retail that do not bear Kansas Tax indicia or upon which the Kansas cigarette tax has not been paid.

The penalty provision is contained in KSA 79-3322(a):

> 79-3322. Penalties. (a) Any person who violates any of the provisions of this act, except as otherwise provided in this act, shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not more than $1,000 or imprisonment for not more than one year, or by both. In addition thereto any person found liable for any license or permit fee or tax imposed under the provisions of this act shall be personally liable for such license or permit fee or tax plus a penalty in an amount equal to 100% thereof.

The basis of the criminal complaint was contraband seized from Mr. Oyler's "Smokeshop" pursuant to a search warrant; specifically 8,888 cartons of cigarettes and four individual packs, none bearing tax stamps, as well as some miscellaneous currency.

On January 31, 1990, a civil forfeiture action was filed pursuant to K.S.A. 79-3323 requesting forfeiture of the untaxed cigarettes that were confiscated pursuant to the search warrant. Kansas Statutes Annotated 79-3323 provides that:

> [a]ll packages of cigarettes, in quantities of twenty (20) packages or more, not bearing indicia of tax payments as required in this act . . . all property and paraphernalia used in the retail sale of such unstamped cigarettes . . . are hereby declared to be common nuisances and contraband. . . . Any cigarettes or property constituting a common nuisance and contraband as

> herein provided may be seized . . . and shall be subject to forfeiture as provided in this act.

After a trial to the court on April 3, 1990, the Honorable Earle D. Jones found petitioner guilty of violating Kansas law in the criminal case and sentence was pronounced on that date. Mr. Oyler immediately filed a notice of appeal and the criminal conviction was affirmed on appeal.

In the forfeiture case, Jimmie D. Oyler, Sr., filed a motion to dismiss alleging that the court had no jurisdiction over him because of his claimed status as a 1/32 Cherokee Indian. The district court rejected his arguments and found that it did have jurisdiction. Subsequently, the parties each filed motions for summary judgment. The district court per the Honorable Janette Sheldon granted summary judgment for the State of Kansas in a written opinion filed on June 8, 1990, and a final order of forfeiture was entered on June 20, 1990, with the proceeds from the sale of the cigarettes to be forfeited to the Treasurer of Johnson County, Kansas.

A notice of appeal was filed on July 2, 1990 with the Kansas Court of Appeals. Their decision affirming the trial court was entered on December 21, 1990. A copy of that Memorandum Opinion is included in the Appendix of this brief.

The section of the petitioner's brief discussing reasons why this court should grant certiorari contains numerous misstatements of the facts and asserts matters which were never a part of the record in the trial court. Essentially, most of pp. 5-17 of petitioner's brief contains arguments, allegations and conclusions that are not facts

of record in this case. As such, they are not properly considered by this Court in determining whether review by certiorari is warranted.

The facts of record established that the petitioner, Jimmie D. Oyler, Sr., privately owns two acres of land which has been characterized as an allotment or is held by Mr. Oyler in some type of restricted status. On that private land Mr. Oyler owns and operates a private enterprise known as "Shawnee Jim's Indian Country Smokeshop". Mr. Oyler is 1/32 Cherokee Indian.

The Cherokee nation of Oklahoma, of which petitioner claimed membership, did not have a tobacco ordinance at the time of this action. At no time has the Cherokee Tribe lived on, or controlled, petitioner's land. It has been held in his family exclusively.

On December 2, 1989, January 13 and 20, 1990, undercover agents with the Kansas Bureau of Investigation went to petitioner's "Smokeshop" and purchased cigarettes from the petitioner that did not have the required tax indicia and the officers did not pay state sales tax on the purchases. The undercover officers are not Indians nor members of Mr. Oyler's "tribe" and petitioner never asked them if they were. Mr. Oyler never disputed that he would sell cigarettes to anyone who came into his "Smokeshop".

Mr. Oyler has never applied for, nor received a cigarette tax license. Mr. Oyler is not exempt from payment of state sales tax. The Kansas Department of Revenue criteria for exemption are based on the pronouncements of this Court in *Washington v. Confederated Tribes of Colville*

Indian Reservation, 447 U.S. 134 (1980) and *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976).

According to the Kansas Department of Revenue, Mr. Oyler did not qualify for an exemption from payment for Kansas state sales tax because: (1) the land on which he operates his "smokeshop" is not under the control of an Indian tribe; (2) the sales of cigarettes from his "smokeshop" are not made by the tribe itself nor by a retailer approved by the tribe under regulations or ordinances adopted by tribal government; and (3) the cigarette sales by petitioner have not been restricted to members of the same tribe which controls the reservation and regulates the retailer. Sales made to non-Indians or members of other tribes are not exempt from payment of state cigarette and sales tax. Petitioner has maintained at all times that his land is exempt from all laws and that he is not subject to any state laws.

Petitioner's request for certiorari to the Kansas Supreme Court should be denied because it does not comply with any of the provisions for discretionary review by this Court.

SUMMARY OF THE ARGUMENT

Petitioner's request for review does not comply with the Rules of this Court and there is no provision for the relief petitioner is requesting. Accordingly, Respondent, State of Kansas, prays that petitioner's petition for "Writ on Certiorari to the Supreme Court of the State of Kansas" be denied in its entirety.

The facts in this case establish that the trial court presiding over the criminal matter found that it had jurisdiction over Jimmie D. Oyler, Sr., as did the trial court which presided over the civil forfeiture action. The Kansas Court of Appeals issued separate written opinions affirming both courts. The petitioner here then requested review by the Kansas Supreme Court which it summarily denied. The petitioner's brief here requests that this Court grant certiorari to the Kansas Supreme Court. No provision exists for the relief requested by the petitioner. Petitioner has not cited the appropriate jurisdictional statute to this Court and has not complied with the Rules of this Court in the preparation of his petition.

The decision of the trial court finding that it had civil jurisdiction over petitioner is firmly anchored in pertinent decisions of this Court, from *California State Board of Equalization v. Chemchuevi Indian Tribe*, 474 U.S. 9 (1985), *reh. denied*, 474 U.S. 1077 (1986), *cert. denied*, 481 U.S. 1051, (1987); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976), and this Court's most recent decision in *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 59 U.S.L.W. 4137 (U.S. Feb. 26, 1991).

Based on the foregoing, the petitioner's request for review should be summarily denied.

ARGUMENT FOR DENYING THE PETITION

I. The petitioner's request for review should be denied.

A. The petitioner has erroneously cited 28 U.S.C. 1254(1) as the basis for this Court's jurisdiction.

This petitioner's request for review by certiorari should be dismissed. The petitioner has erroneously cited 28 U.S.C. 1254(1) as the basis for the Court's jurisdiction. This is not the appropriate statute. No federal circuit court of appeals has ever been involved in this case and, as such, 28 U.S.C. 1254(1) is not applicable.

B. The burden is on the petitioner to show affirmatively that the Supreme Court has jurisdiction, a burden which the petitioner has failed to sustain in this case.

The party requesting review by this Court must affirmatively show that the Court has jurisdiction. *See e.g., Dept. of Dental Hygiene of California v. Kirchner*, 380 U.S. 194 (1965), *on remand*, 43 Cal. Rptr. 329, 400 P.2d 321 (1965). It must affirmatively appear that a federal question was actually decided. The petitioner has failed to sustain this burden.

C. Petitioner has not complied with the Rules of this Court.

An application to the United States Supreme Court for writ of certiorari to review the judgment of a state court must be made in the manner prescribed by statute and the Rules of the Supreme Court. The petition for

review in this case does not comply with applicable statutes nor with the Rules of this Court.

1. The petitioner has not complied with Rule 10.1(b) or (c) because the highest court in Kansas has not addressed the jurisdiction issue on its merits.

The highest court in Kansas, the Kansas Supreme Court, has not addressed the issue of jurisdiction over Mr. Oyler, which is the issue petitioner is presumably asking this Court to review. Further, the Kansas Supreme Court has never decided a federal question in a way which conflicts with the decision of another state court of last resort or of a United States Court of Appeals, a circumstance which is contemplated by Rule 10.1(b) before this Court will entertain discretionary review. Additionally, the decision of the trial court does not conflict with applicable decisions of this Court. Rule 10.1(c).

2. Petitioner's request for review should be denied for lack of clarity and specifically in violations of Rules 14.1 and 14.5.

Review by this Court on writ of certiorari is not a matter of right, but of discretion. Rule 10.1. Such a petition should be granted only when there are special and important reasons therefor. The petitioner has provided no special nor important reasons to the Court. The petitioner's request should also be denied for a violation of Rule 14.1, subsections (e), (g), (h), (j), and Rule 14.5.

It is not at all clear from the petition what is being requested. The petitioner has entitled his brief as a "Petition on Writ of Certiorari to the Supreme Court of the State of Kansas," yet on page 1 of his brief he requests that this Court review the opinion and judgment of the Kansas Supreme Court of March 13, 1991, denying his Motion for review. The petitioner appears to argue in his brief, however, that this Court should review the decision of the Kansas Court of Appeals affirming the forfeiture. Petitioner has not concisely nor specifically set out what relief he is requesting from this Court, nor the legal basis on which the Court could grant that relief. No opinion was ever issued by the Kansas Supreme Court and the Court never addressed the issue of jurisdiction; it simply denied petitioner's request to review the decision of the Kansas Court of Appeals which affirmed the trial court's finding of jurisdiction.

Accordingly, and pursuant to Rule 14.5 of this Court, the petition should be summarily denied because the petitioner's brief has failed to set forth with accuracy, brevity and clearness the essential facts necessary for this Court to consider. The Rule states that this alone is a sufficient reason for denying the petition for review.

D. The decision of the Kansas State District Court finding jurisdiction was based on the decisions of this Court.

The issue of whether states can validly tax sales of cigarettes from Indian "smokeshops" has been reviewed by this Court on several occasions. The petitioner in this case has consistently ignored those decisions. This Court

has consistently held that a state has the right to require an Indian retailer to collect excise tax on cigarettes sold by a tribe to non-Indian purchasers. *See, e.g., California State Board of Equalization v. Chemchuevi Indian Tribe*, 474 U.S. 9 (1985), *reh. denied*, 474 U.S. 1077 (1986); *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976). The decisions in these cases were considered by the trial court in finding that it had jurisdiction over petitioner.

The Court's recent decision in *Oklahoma Tax Comm'n v. Citizen's Band Potawatomi Indian Tribe of Oklahoma*, 59 U.S.L.W. 4137 (U.S. Feb. 26, 1991), held that even a tribe's sovereign immunity does not prevent a State from exercising its authority to collect tax on sales of cigarettes to nonmembers and that the tribe has an obligation to assist states in the collection of the tax. In the case presently before the Court, the petitioner's "smokeshop" is a private enterprise, owned and operated by him on private property and not associated with any Indian tribe, although he claims to be a member of the "Cherokee Nation." He would sell cigarettes to whomever would walk in the door. He would never inquire if the purchaser was an Indian.

Counsel for petitioner has often cited *The Kansas Indians (Blue Jacket v. The Board of Commissioners of the County of Johnson)*, 72 U.S. (5 Wall) 737 (1867), as authority for his position, yet that case dealt with the *ad valorem* taking of Indian lands which is not at all at issue here.

E. Petitioner's earlier request for Review by Certiorari was Denied by the Court.

In July, 1990, petitioner filed a "Petition on writ of certiorari to the Supreme Court of the State of Kansas" requesting that this Court review the decision of the Kansas District Court in the criminal case that it had jurisdiction over him. That request for review was denied by this Court. The instant petition for review is, in essence, the same document which was filed before but specifically requests review of the decision of the Court which ruled that it has civil jurisdiction over him in the forfeiture proceeding. No new authority, nor reasons for the granting of petitioner's request for review have been advanced.

CONCLUSION

For the reasons articulated above, Respondent, State of Kansas, respectfully requests this Honorable Court to deny Mr. Oyler's petition for writ of certiorari in its entirety.

Respectfully submitted,

MELINDA SWANSON WHITMAN
Counsel of Record for
Respondent, State of Kansas

APPENDIX

No. 65,417

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Appellee

v.

JIMMIE D. OYLER, SR.,
Appellant.

SYLLABUS BY THE COURT

1.

The State's jurisdiction in a forfeiture proceeding is not derived from civil jurisdiction over the person of the defendant but is based on in rem proceedings against the goods seized as contraband.

2.

Where the State of Kansas possesses criminal jurisdiction over a defendant for violation of the Kansas cigarette tax and sales tax laws, it has in rem jurisdiction to proceed with the forfeiture of contraband seized from the defendant at the time of his arrest.

Appeal from Johnson District Court; JANETTE SHELDON, judge. Opinion filed December 21, 1990. Affirmed.

Pamela S. Thompson, of Horton, for the appellant.

Melinda S. Whitman, assistant district attorney, Paul J. Morrison, district attorney, and Robert T. Stephan, attorney general, for the appellee.

Before LARSON, P.J., DAVIS, J., AND RICHARD W. WAHL, District Judge Retired, assigned.

DAVIS, J.,: The defendant, Jimmie D. Oyler, Sr., appeals the forfeiture of cigarettes and money seized by the State of Kansas at the time of his arrest. He contends that the State of Kansas lacks civil jurisdiction to proceed with a forfeiture action because he is a Cherokee Indian and because his smokeshop is located on Indian land.

Jimmie D. Oyler, Sr., owns and operates Shawnee Jim's Indian Country Smokeshop (Smokeshop) located in rural Johnson County, Kansas. Oyler is an enrolled member of the Cherokee Nation. The Smokeshop is on Shawnee Reserve 206 which Oyler claims is Indian land.

The Kansas Department of Revenue determined that Oyler was not eligible to possess or sell cigarettes without Kansas tax stamps and denied his request for permission to allow a wholesaler to sell untaxed cigarettes to him. In August 1988, the Kansas Director of Taxation notified Oyler that he was violating Kansas law for selling non-taxed cigarettes from his Smokeshop and ordered Oyler to cease and desist.

On December 2, 1989, Kansas Bureau of Investigation Special Agents Nathan Yonally and Richard Marchewka, working undercover, entered the defendant's Smokeshop and purchased three cartons of cigarettes. None of the cigarette packages had Kansas tax stamps on them and Agent Yonally did not pay sales tax. The defendant did not ask the agent if he was an Indian.

The defendant was tried and convicted on three counts of possession of more than 200 cigarettes without

the required tax indica (K.S.A. 79-3321) and three counts of selling cigarettes at retail that did not bear the Kansas tax indica (K.S.A. 79-3321). We affirmed the defendant's conviction in *State v. Oyler*, 15 Kan. App. 2d ___, ___ P.2d ___ (No. 65,061, filed December 21, 1990).

At the time of the defendant's arrest, 8,888 cartons of cigarettes, money from cigarette sales, and records concerning sale of cigarettes were seized. An order to show cause why the seized property should not be forfeited was filed. The defendant's motion to dismiss for lack of subject matter jurisdiction was denied without opinion by the trial court. The cigarettes seized were ordered forfeited as contraband and sold, and the proceeds from the sale were placed with the Johnson County District Court. Defendant appeals from the trial court's grant of the State's motion for summary judgment on the issue of forfeiture.

The facts are not in dispute. The sole issue raised by the defendant involves his contention that the State of Kansas lacks jurisdiction to proceed with forfeiture because he is a Cherokee Indian and his Smokeshop is on Indian land. In *State v. Oyler*, 15 Kan. App. 2d ___, we held that the State of Kansas possessed criminal jurisdiction over Jimmie D. Oyler, Sr., under the provisions of 18 U.S.C. 3243 (1988). Based on its exercise of criminal jurisdiction over the defendant, the State at the time of defendant's arrest seized the property in question as contraband. K.S.A. 79-3323 defines contraband as it relates to this case as "[a]ll packages of cigarettes, in quantities of twenty (20) packages or more, not bearing indica of tax payment as required in this act."

Forfeiture actions are proceedings in rem:

> "Forfeiture statutes are premised on the notion that the thing to be forfeited has itself offended society, either because it is contraband or has been used to violate laws deemed of special social importance. [Citation omitted.] . . . Although enforced through proceedings in rem, forfeitures are penal in nature. [Citation omitted.]" *State v. One 1987 Chevrolet corvette*, 8 Kan. App. 2d 747, 749-750, 667 P.2d 893 (1983).

The State's jurisdiction in this case is not derived from civil jurisdiction over the person of the defendant but is based on in rem proceedings against the goods seized as contraband.

Moreover, the forfeiture in this case is penal in nature. The State of Kansas possessed criminal jurisdiction over the defendant for violation of the Kansas cigarette tax and sales tax laws. *State v. Oyler*, 15 Kan. 2d ___. It is from the criminal action and seizure of contraband that the State of Kansas has jurisdiction to proceed in rem with the forfeiture of the contraband. It also follows that the State of Kansas possesses jurisdiction over the defendant due to the penal nature of the forfeiture under the provisions of 18 U.S.C. 3243.

Having concluded that criminal jurisdiction was conferred upon the State of Kansas by the provisions of 18 U.S.C. 3243, it becomes unnecessary to determine whether the State of Kansas has civil jurisdiction over the defendant. We acknowledge that neither Kansas nor the United States Congress has acted to assume civil jurisdiction over Indians in the State of Kansas. However, contrary to the defendant's contention, such legislation is not

necessary in this case because the State of Kansas properly assumed criminal jurisdiction over the defendant which was sufficient to support the in rem forfeiture action.

Affirmed.

COURT OF APPEALS ORDER

DISTRICT CASE NO. 90C1293

IN THE COURT OF APPEALS

OF THE STATE OF KANSAS

MELINDA S. WHITMAN
ASSISTANT DISTRICT ATTORNEY
JOHNSON COUNTY COURTHOUSE
P. O. BOX 728
OLATHE KS 66061

STATE OF KANSAS, APPELLEE,
V
JIM D. OYLER, SR., APPELLANT.

NO. 90-65417-A

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN IN THE ABOVE ENTITLED CASE:

PETITION FOR REVIEW - OYLER.
CONSIDERED BY THE COURT AND DENIED.

DATE: 03/13/91.

YOURS VERY TRULY,
LEWIS C. CARTER
CLERK, SUPREME COURT